IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0390
Appellee,	)	DEPARTMENT A
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
ARNULFO ENRIQUEZ GARCIA,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20050488

Honorable Robert Duber, II, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Julie A. Done — Phoenix
Attorneys for Appellee

Emily Danies — Tucson
Attorney for Appellant

B R A M M E R, Judge.

¶1 A jury found appellant Arnulfo Enriquez Garcia guilty of two felonies: possessing methamphetamine, a dangerous drug, for sale and possessing drug paraphernalia. It also found he had a prior felony conviction and the amount of methamphetamine in his

possession had exceeded the threshold amount of nine grams. *See* A.R.S. §§ 13-3407(D); 13-3401(36)(e). The trial court sentenced Garcia to concurrent, enhanced, presumptive prison terms of 9.25 and 1.75 years. On appeal, Garcia contends the trial court erred in denying the motion for mistrial he made after a police sergeant testified that the area where he had encountered Garcia was one known for high drug activity.

¶2 "[T]he declaration of a mistrial is the most dramatic remedy for a trial error and should be granted only if the interests of justice will be thwarted otherwise." *State v. Roque*, 213 Ariz. 193, ¶ 131, 141 P.3d 368, 399 (2006). We will not overturn a trial court's ruling on a motion for mistrial unless the court has clearly abused its discretion. *State v. Williams*, 209 Ariz. 228, ¶ 47, 99 P.3d 43, 54 (App. 2004). Absent such abuse, when a motion for mistrial is based on the introduction of improper or inadmissible evidence, we defer to the trial court's discretionary determination whether to grant a mistrial "because the trial judge is in the best position to assess the impact of a witness's statements on the jury." *State v. Dann*, 205 Ariz. 557, ¶ 43, 74 P.3d 231, 244 (2003).

¶3 Viewed in the light most favorable to upholding the jury's verdicts, *State v. Ellison*, 213 Ariz. 116, n.1, 140 P.3d 899, 906 n.1 (2006), the evidence established that Globe police sergeant Ray Hernandez was on duty and working as a patrol supervisor when Garcia attracted his attention by honking the horn of his car. At the time, Garcia was sitting in the driver's seat of a car that was parked with its engine running. As Hernandez drove past him, Garcia's "eyes got big," and he looked nervous. Hernandez turned his vehicle

around, parked behind Garcia's car, and approached Garcia on foot. As soon as he made contact with Garcia, who was still seated in the car, Hernandez saw a gram scale, an item of drug paraphernalia, "sticking up" from between the front passenger seat and the center console.

¶4 After receiving Garcia's permission to search the car, Hernandez called for another officer to assist him and asked Garcia to step out of the vehicle. The second officer stood with Garcia as Hernandez searched the car and soon found a small, plastic, ziplock bag. After seeing that the small, "one-by-one" bag contained what appeared to be drug residue, Hernandez told the second officer "to go ahead and arrest [Garcia]." Moments later, Garcia bolted and ran, and the two officers pursued him on foot. Both observed Garcia running with "his hand stuck down his right pocket" until the second officer saw him bring his hand up and make a throwing motion with his arm. Although neither officer saw what Garcia had thrown, they subsequently found, approximately twenty-five to thirty feet from where Garcia had made the throwing motion, a clear, plastic bag containing a golf-ball-sized substance that proved to be methamphetamine.

¶5 On the second day of trial, Sergeant Hernandez described having approached the driver's side of Garcia's car and having immediately seen the gram scale between the center console and the front passenger seat. Asked what he had done when he saw the scale, Hernandez replied: "I started conversing with him about, you know, what he was doing there; that it was [an] area known for high[] drug activity, especially across the street from

where he was parked." Defense counsel immediately asked to approach the bench and, in an unreported colloquy, objected to the statement. The prosecutor's next question to Hernandez before the jury was whether Garcia had said "what he was doing there," to which Hernandez responded: "Yes. He said that he was waiting for a friend."

¶6 Later, outside the presence of the jury, the court and counsel further discussed the admissibility of Hernandez's characterization of the locale as an area of high drug activity. The trial court sustained Garcia's objection to the statement, and Garcia asked the court to declare a mistrial, arguing that a cautionary instruction to the jury would be an insufficient remedy. The court ultimately denied the motion for mistrial but invited defense counsel to prepare a curative jury instruction. The court gave the instruction Garcia proposed, stating: "During the recess, I ordered stricken from the record the testimony of Ray Hernandez that the area where the defendant was parked was an area of high[] drug activity." The court further instructed the jury that it must not consider any testimony that had been stricken from the record.

¶7 Assuming for present purposes that the statement actually was improper, we find no abuse of the trial court's discretion in giving the curative instruction instead of granting a mistrial. As the state notes, Hernandez had made precisely the same statement in testifying before the grand jury and at the pretrial evidentiary hearing on Garcia's motion

to suppress evidence.[1] Both times, Hernandez was asked what had happened when he approached Garcia as he sat in his car, and both times, Hernandez testified he had explained to Garcia that Garcia had attracted Hernandez's attention by honking his horn while parked in an area known for high drug activity. Garcia did not move in limine to preclude the reference at trial, nor did he object before Hernandez answered the question that elicited the by-then-predictable answer.

¶8 To warrant the drastic remedy of a mistrial, Garcia would need to show both that "the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and . . . the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003). In light of the substantial other evidence of Garcia's guilt—the drug paraphernalia found in his car, his sudden flight from the officers, and the strong circumstantial evidence that he had possessed a golf-ball-sized quantity of methamphetamine that he had tried to dispose of as he fled—it is highly unlikely that Hernandez's passing description of the location as an area of high drug activity would have had any appreciable effect on the jury's verdict.

¶9 In refusing to declare a mistrial, the trial court effectively found the statement caused no prejudice to the defense, *see Lamar*, and Garcia has not demonstrated that the

[1]According to the state, the same phrasing also appears in the police report, which the record before us does not contain.

court abused its discretion. We conclude, as the supreme court did in *Lamar*, that the court's curative instruction to the jury to disregard the statement "sufficiently overcame any probability" that the jury was influenced by the remark. *Id.* ¶ 43.

¶10 Finding no abuse of the trial court's discretion in denying Garcia's request for a mistrial, we affirm his convictions and sentences.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

PHILIP G. ESPINOSA, Judge